POSITION OF MARKENVERBAND

MARKENVERBAND CLARIFIES: DIGITAL SERVICES ACT IS ONLY A SHARP SWORD IF PROPOSED MEASURES ARE AMENDED

Markenverband (German Brands Association) represents the interests of brand-oriented businesses in Germany. Founded in Berlin in 1903, the federation has about 400 members, which in Germany account for a turnover of more than 300 billion euros in branded consumer goods and around 200 billion euros in the services sector. This makes Markenverband the largest federation of this kind in Europe.

Member companies come from sectors including foodstuffs, pharmaceuticals, fashion and textiles as well as telecommunications. Members include Beiersdorf, Hugo Boss, Coca-Cola, Deutsche Bank, Deutsche Post, Falke, Nestlé, Procter & Gamble, Dr. Oetker and many other highly regarded firms.

MARKENVERBAND is a registered interest representative at the EU Commission (No. 2157421414-31).

A. The Digital Services Act – what is Markenverband concerned with?

Markenverband e.V. welcomes the European Commission's efforts to shape a set of rules to succeed the eCommerce Directive with the Digital Services Act (DSA) published on 15.12.2020. The DSA is intended to provide a fair and secure Internet for all and to strike a balance between the rights and responsibilities of users, intermediary platforms and public authorities. The basic idea of the DSA is to ensure that what is illegal offline is also illegal online.

The members of Markenverband view the EU's endeavor with very great interest, as counterfeiting is a constantly growing problem, especially in the rapidly booming e-commerce market. With an increase of 11.4 percent to 65.1 billion euros, gross sales of goods in e-commerce continued to grow in double digits in 2018. Even before the Corona crisis, pure e-commerce sales thus accounted for more than one in eight euros in the retail sector (source: Bundesverband e-Commerce und Versandhandel Deutschland e.V.). A continuous increase during and after the Corona crisis has to be assumed.

At the same time, the numbers of counterfeits that are offered online are rising. According to a report published by EUIPO in March 2019, 6.8% of EU imports – equivalent to around EUR 121 billion per year – were counterfeit products, a significant increase on the report published in 2016 (85 billion per year)[1]. These counterfeit goods very often pose a risk to consumers' health and life; in fact, according to the 2019 EUIPO study [2], 97% of these products posed a serious risk. In connection with the Corona pandemic, counterfeit COVID-19 protective products are also being deliberately placed on the market. For example, in its November 11[3], 2020 report, Europol stated that in 2020, the distribution of counterfeit and substandard goods was one of the main criminal activities during the pandemic. With the outbreak of the pandemic, demand for health and hygiene products (masks, gloves, detergents, hand sanitizers) and personal protective equipment had increased significantly. This has been accompanied by a significant increase in the sale of low-quality masks and other protective equipment. Complementing this, Europol's[4] December publication shows the ruthlessness with which criminals exploit COVID-19 and offer medical products, even counterfeit antivirals, online at the expense of public health. Protection against counterfeits available online is particularly relevant in the current times of the Corona pandemic, as online shopping is the only alternative to shopping downtown during the shutdown.

In this context, Markenverband sees three main challenges in connection with e-commerce that need to be solved in order to ensure safe e-commerce for consumers:

1. Anonymity / difficulty in identifying sellers.
2. Prevention of counterfeiting online
3. Lack of information from buyers on identified counterfeits

B. Evaluation of the measures proposed in the DSA to combat these three main problems

From the perspective of Markenverband, the objectives pursued by the DSA – fair and secure online trade via platforms – can unfortunately not yet be achieved by the draft presented.

A comparison of the difficulties for consumers and rights holders with the proposed solutions of the European Commission shows that the EP and the Council still have to specifically supplement the partly good approaches in the Commission's proposed regulation.

[1] 2019_Status_Report_on_IPR_infringement_en
[2] EUIPO Qualitative study on risks by counterfeits on consumers 2019
[3] (Source: Report Europol November 11 2020: How Covid-19-related crime infected Europe during 2020)
[4] 10122020_operation_shield_europol_en.pdf

1. The difficulty of identifying the seller

Unlike in bricks-and-mortar retail, the buyer in online retail cannot easily identify his seller. It is therefore all the more important to provide the buyer with the necessary information to enable him to gain an impression of the seller and to be able to check his reliability and trustworthiness. With the introduction of the "Know Your Business Customer" principle in Art. 22 (1) of the draft regulation, the European Commission has laid an important basis for ending the anonymity of the seller that has often existed up to now. The regulations presented by the Commission thus point in the right direction. However, in order to really provide the buyer with the necessary information, the following additions should be made as a matter of urgency:

a. The identification options listed in Art. 22 (1) of the draft regulation (obtaining (copies of) official documents or querying freely accessible official online databases) should be mandatory for the platforms. This is the only way to ensure reliable identification.

b. Platforms must prove, upon request, that they have taken the correct identification measures. If necessary, guidelines should be drawn up in which the measures to be taken are described and defined in more detail.

c. The identity of the merchant must also be compellingly identifiable to consumers and affected rights holders – and not just to law enforcement authorities. This is the only way to ensure that the consumer and affected rights holders themselves can address problems correctly and quickly in the sense of an effective solution. Consequently, Art 22 (5) of the draft regulation should be expanded accordingly.

d. To avoid double registrations, only one registration per identity document should be allowed.

e. In addition, companies should not be able to evade their obligations by falsely posing as private individuals.

f. An effective approach to seller identification also requires that this requirement be extended to all online intermediaries. In the spirit of the transparency requirement, they must know from whom they are paid for their services.

2. Prevention of counterfeiting online

The regulations proposed so far in the draft regulation are only partially suitable for preventing the offering of counterfeits online via platforms. Thus, the procedure of deleting reported counterfeits proposed so far by the draft DSA can only be one component of the goal of preventing the offering of counterfeits online. However, in order to ensure that consumers are not offered counterfeits, a differentiation must be made. The following issues must be considered separately in this problem:

a. The (simply designed) notification of an offered counterfeit
b. The re-uploading and offering of counterfeits
c. The basic visibility of counterfeits

a. The (simply designed) reporting of the counterfeiting

The harmonization of action against illegal content (so-called notice and action) provided for in Art. 14 of the proposed regulation certainly contributes to the effectiveness in the fight against counterfeiting, in particular also the option to make several individual mentions in one notification.

Markenverband very much welcomes a clarification that notifications can be made in relation to all mentions of a seller.

b. The re-uploading and offering of counterfeits

With the proposed solutions in Art. 20 and Art. 14 of the draft regulation, the EU Commission unfortunately falls well short of the principle of the so-called "stay down", which is already anchored in various places.

For example, the ECJ[5] has explicitly stated that a platform "...must also effectively contribute to the prevention of repeated infringements". The e-Commerce Directive [6] also already opens up the possibility of demanding the cessation or prevention of an infringement by means of judicial or official orders. Thus, the e-Commerce Directive is not limited to the "notice-and-take-down" principle, but goes beyond it.

The approach proposed so far in the draft regulation therefore not only disregards existing and established ECJ case law and the direction already taken by the e-Commerce Directive, but cannot be an adequate regulation in terms of its suitability for the future.

[5] C-324/09 L'Oréal SA and Others v eBay International AG and Others
[6] Art. 3 and recital 45 e-commerce directive

This is because, in practice, even the measures proposed in Article 20(1) of the draft regulation are not effective in preventing the re-uploading of illegal products in the long term. On the one hand, the paragraph calls for multiple infringements with obviously illegal content; on the other hand, the suspension of services is only limited in time.

The solutions to the "repeated infringers" do not sufficiently counteract the problem that, for example, illegally acting sellers can switch back and forth between different accounts. Thus, illegally acting sellers can offer counterfeits several times without falling under the criterion "repeatedly".

At the same time, the temporary blocking of such sellers does not provide effective protection for consumers from buying counterfeits. Illegally acting sellers are not effectively deterred on a permanent basis, as they can resume their activities after a certain period of time.

Rather, the re-permissioning of illegally acting actors is a major or recurring obstacle to making online commerce via platforms safe for legally acting stakeholders and consumers in the long run. Likewise, the extreme additional effort for rights holders must be taken into account. The consistent repetitive notifications are necessary to ensure that counterfeit goods are not re-offered. While platforms use new technologies and automated processes to identify counterfeits, rights holders, for their part, are generally forced to perform (at least mostly) manual checks.

The regulations proposed in the draft regulation so far are therefore not sufficient to counter the extraordinary danger posed by the re-uploading of counterfeits. Improvements are urgently needed here.

c. Visibility of counterfeits per se

The threat to consumers begins the moment a counterfeit is offered to them online. Effective consumer protection accordingly means that the goal should be to prevent consumers from being exposed to this risk in the first place.

In the consultation related to the "New Consumer Agenda", 77% of respondents indicated that they consider it very important that dangerous products are not offered on the web. Consumers must and want to be able to trust that they can shop online without worry. Accordingly, it is part of the service to be provided that consumers are not offered counterfeits in the first place, or that these are not made available to them for selection.

Markenverband proposes the following solutions to enable the DSA to effectively meet this frequently expressed wish or the need for adequate consumer protection:

i. Thus, information on the type and scope of offering of counterfeit goods should be included in the catalog of risks mentioned in Art. 26 and 27 of the draft regulation. This is because it is obvious that, due to the large number of counterfeits offered by type and volume of goods offered on a platform, this is a systemic risk against which measures would have to be taken, as is already regulated with regard to other risks in Art. 26 of the draft regulation.

ii. This leads to the need to standardize the obligation for proactive monitoring as an effective risk measure in Art. 27 of the draft regulation. Only through such proactive monitoring can it be effectively ensured that the necessary measures are taken in line with the identified systemic risk to ensure that the identified risk does not materialize.

So far, the draft regulation provides for a differentiation of platforms according to their size with regard to their obligations to prevent systemic risk. However, a differentiation as currently provided for in the draft regulation would consequently lead to an evasion of illegally acting sellers to smaller platforms, which would have lower security standards as a consequence of the DSA requirements.

Of course, the regulations of the DSA guidelines should also allow for innovations in the future and enable all participants (regardless of their size, etc.) to act on a fair basis. Therefore, it is necessary to create a fair balance on the one hand between the need for effective safeguards on the one hand and the consideration of the capacities and actual possibilities of smaller platforms or startups on the other hand.

Markenverband therefore proposes as a solution that smaller platforms should at least be obliged to carry out "random checks". On the one hand, illegal traders would then not be able to rest assured that their counterfeits are more likely to remain undetected, and on the other hand, smaller platforms would not be unduly burdened, as the extension of the obligations under Art. 26, 27 of the Regulation would only oblige them to perform "random screening". The proposed solution would also ensure that the same due diligence standards would be applied online and offline to identify illegal products.

3. Lack of information from buyers on identified counterfeits

One of the European Commission's objectives in connection with the DSA is also said to be the strengthening of consumer information in connection with online trade.

Markenverband welcomes the facilitation for consumers in connection with the proposed harmonized "notice & action" procedures, but explicitly points out the imbalance in information rights in relation to Art. 15 of the draft regulation between consumers and sellers.

In the view of Markenverband, it is fully in line with the transparency requirement that the seller learns why his product has been removed from the platform.

However, a consistent interpretation of the transparency requirement and effective consumer protection conversely also require that the consumer is also informed if a product purchased by him has been deleted from the website as an illegal product. While the seller has the possibility to defend himself against the decision of the platform, the consumer would otherwise remain unprotected and without rights due to ignorance.

Therefore, in the interest of the consumer empowerment sought by the Commission, an anchoring of the obligation to inform consumers on the part of the platforms should be included in the DSA.

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